

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-2580

United States Court of Appeals

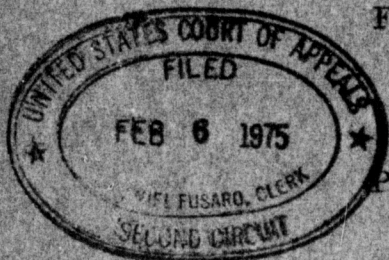
For the Second Circuit.

THEODORE GRIECO, JR.,
Plaintiff-Appellant,

against

MEMORIAL HOSPITAL OF GREENE COUNTY,
FRANCIS FUGARO,
Defendants-Appellees,

and



PAUL M. SNAPPER,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANTS-APPELLEES.

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Defendants-Appellees,

and

PAUL M. SNAPPER,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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BRIEF FOR DEFENDANTS-APPELLEES.

Preliminary Statement of Facts.

On August 1, 1974, a complaint was filed and a summons issued in the case at bar. The action is one for alleged malpractice by the Memorial Hospital of Greene County, its employee, Dr. Francis Fugaro, and by a private physician, Dr. Paul M. Snapper. The lawsuit arose out of the care and treatment of Theodore Grieco, Jr., the plaintiff-appellant herein, on January 13, 1974, by Dr. Fugaro and Dr. Snapper at the hospital in Catskill, N. Y.

Following service of a copy of the summons and complaint on August 8, 1974, a motion was filed in behalf of

the hospital to dismiss the complaint pursuant to Fed. R. Civ. P 12(b) and 56 for failure to state a claim entitling plaintiff to relief. The ground asserted was that no notice of claim preceded the suit although required by law as a condition for suit against county departments (N. Y. County Law §52, N. Y. General Municipal Law §50-e). A similar motion was filed on September 19, 1974, in behalf of Dr. Francis Fugaro, who asserted that as an employee of this county hospital that any suit against him likewise had to be preceded by service of a notice of claim upon him.

There is no dispute that at no time was any notice of claim ever served upon the Memorial Hospital of Greene County, Dr. Francis Fugaro, or the County of Greene.

Following service of additional moving and opposing papers and memoranda of law, decision was reserved by the Honorable Milton Pollack, United States District Judge, and on October 30, 1974, he granted the motions of Memorial Hospital of Greene County and Dr. Fugaro and ordered that judgment be entered in their favor (86a-91a).

In support of its application, the hospital filed an affidavit of its administrator, Raymond Clark. He noted therein that the plaintiff had not filed the notice of claim required by Section 50-e of the General Municipal Law of the State of New York. His affidavit made reference to Section 52 of the County Law of the State of New York which requires that any notice of claim must be made and served in compliance with Section 50-e of the General Municipal Law and that every action upon such claim had to be commenced pursuant to the provisions of Section 50-i of the General Municipal Law (13a-14a).

In the first paragraph of the affidavit of Raymond Clark, it was stated that the Memorial Hospital of Greene County was "a hospital which is a Department of the County of Greene, State of New York" (13a).

The malpractice complained of in the case at bar was alleged to have taken place on January 13, 1974. This meant that the notice of claim had to be served not later than April 13, 1974. No notice of claim was ever served (15a).

The affidavit of Francis Fugaro, M. D., asserted that the complaint against him should be dismissed on the ground that he was employed by the hospital as a resident physician and was likewise entitled to have a notice of claim served upon him before any action could be instituted against him. He observed that no notice of claim was ever served upon him. Section 52 of the County Law of the State of New York requires service of such a notice as a condition precedent to the institution of suit (36a-38a).

There was attached to this affidavit of Dr. Fugaro, as an exhibit marked "Exhibit C," a copy of Chapter 132 of the Laws of New York (1931) which law authorized and empowered the Board of Supervisors of Greene County to establish in such county a public general hospital (38a, 42a).

Following the enactment of Chapter 132, the Board of Supervisors of Greene County on February 16, 1931, adopted a resolution creating the Memorial Hospital of Greene County as a county hospital pursuant to Sections 45 and 49 of the County Law of the State of New York and Section 126 of the General Municipal Law of the

State of New York. A certified copy of said resolution was marked "Exhibit D." It appears at pages 43a-44a of the Appendix (38a).

By virtue of said resolution, the Memorial Hospital became an agency or department of the County of Greene and thereby it and its employees became entitled to all of the immunity and protection afforded the county itself (38a-39a).

It was pointed out in this affidavit of Dr. Fugaro that the Board of Managers of the hospital was appointed by the Greene County Board of Supervisors; that all employees of the hospital were subject to the New York State Civil Service Law; that they were paid by the Treasurer of Greene County; and that all operating income of the hospital was turned over to the Treasurer of Greene County who in turn paid all the operating expenses (39a).

All of the foregoing was confirmed in the further moving affidavit of Raymond Clark, sworn to on September 24, 1974. Said affidavit also incorporated Chapter 132 of the Laws of 1931, and the resolution of the Board of Supervisors of Greene County, dated February 16, 1931. It noted that the Board of Managers of the hospital was appointed by the Greene County Board of Supervisors; that all hospital employees were subject to New York State Civil Service Law and were paid by the Treasurer of Green County; and that all operating income of the hospital was turned over to the Treasurer of Greene County who in turn paid all operating expenses (56a-57a).

It was set forth in this affidavit of Raymond Clark that the "Memorial Hospital of Greene County, Inc."

is and always has been a separate and distinct entity from the Memorial Hospital of Greene County. He observed that neither the County of Greene nor the Memorial Hospital of Greene County took any part in the filing of the membership corporation papers on May 18, 1926, or the renewal papers which were filed on March 6, 1951. Since the establishment of a public general hospital was authorized in 1931, and since the erection of the hospital, it was noted that the primary function of the "Memorial Hospital of Greene County, Inc." was from time to time to solicit funds for the hospital (59a).

POINT I.

Summary judgment was properly granted both defendants inasmuch as no notice of claim was ever served upon them, as required by law.

In his memorandum opinion directing the dismissal of the complaint and awarding summary judgment to both the hospital and Dr. Fugaro, Judge Pollack observed that the precise question involved herein was raised against this same hospital in *Pope v. Memorial Hospital of Greene County*, 74 Civ. 3279 (LFM) (October 16, 1974), where Judge MacMahon concluded that in such circumstances the suit must be dismissed. (No appeal was ever taken from the judgment dismissing the action against the hospital in the *Pope* case.) Judge Pollack concluded for the reasons well expressed in the opinion of Judge MacMahon in the *Pope* case that the suit of Grieco against both the Memorial Hospital of Greene County and Dr. Fugaro should be dismissed and judgment entered in their favor (86a).

Judge Pollack held that Grieco's suit against Dr. Fugaro was barred because as an employee of the county hos-

pital as a resident physician he too was entitled to the conditions imposed by the statute, which required service of a notice of claim upon him. (*Stephens v. Department of Health of Orange County*, 62 Misc. 2d 81, 314 N. Y. S. 2d 118, Sup. Ct., Orange County, 1970; *Dorak v. County of Nassau*, 329 F. Supp. 497, 502 E. D. N. Y. 1970, aff'd 445 F. 2d 1023, 2d Cir. 1971.)

In his opinion in the *Pope* case, Judge MacMahon concluded that "beyond any genuine issue of fact, defendant hospital is a department of the County of Greene" and therefore entitled to all of the immunity and protection afforded the county itself. Applying New York law, he held "it is clear that a notice of claim is a condition precedent to suit against Greene County." Since concededly no notice of claim was ever served, Judge MacMahon granted summary judgment dismissing the *Pope* case as against the Memorial Hospital of Greene County (78a-79a).

Grieco's attorneys urge in their brief that Judge MacMahon erred by placing "great stress" on an apparent dissolution of the membership corporation known as Memorial Hospital of Greene County, Inc. However, in Judge MacMahon's opinion there is no reference to the apparent dissolution of said membership corporation. It is merely referred to in one of the footnotes. Moreover, as Judge Pollack stated in his opinion in the case at bar, the fact that said membership corporation may have continued to exist makes no difference. He noted that, if this were true, that fact "does not change the result reached here." He went on to say: "Whether plaintiff correctly shows that the membership corporation continues to exist is irrelevant here. The interlocking factors between the hospital and the membership corporation are insufficient as a matter of law to affect the former's status as a department of Greene County and thus entitled to the protection of

the notice of claim requirements before institution and as a condition of suits for damages" (78a-79a, 88a-89a).

It is urged at page 9 of the brief filed by Grieco's attorneys that "crucial to Judge MacMahon's finding that the hospital had to be a County department was his determination that the membership corporation had dissolved before the occurrence by operation of law." However, as it has just been pointed out, it made no difference whether or not the membership corporation continued to exist.

Section 52 of the New York State County Law provides as follows:

"§52. Presentation of claims for torts; commencement of actions

"1. Any claim or notice of claim against a county for damage, injury or death, or for invasions of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part because of any misfeasance, omission of duty, negligence or wrongful act on the part of the county, its officers, agents, servants or employees, must be made and served in compliance with section 50-e of the general municipal law. * * *

"2. No action shall be maintained against an officer, agent, servant or employee of a county unless the notice of claim for damages was filed in the manner and within the time prescribed in subdivision one and also served personally or by registered mail upon such officer, agent, servant or employee within the same period of time."

Section 50-e of the New York State General Municipal Law provides as follows:

“§50-e. Notice of claim

“1. In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general corporation law, or any officer, appointee or employee thereof, the notice shall comply with the provisions of this section and it shall be given within ninety days after the claim arises.”

The General Corporation Law of New York State, as it existed on January 13, 1974, defined a “public corporation” as including “a municipal corporation.” It defined “a municipal corporation” as including “a county, city, town, village and school district” (Section 3).

It is conceded on this record that no notice of claim was ever served on the defendant hospital, Dr. Fugaro, or the County of Greene. There is no dispute that Dr. Francis Fugaro was, in fact, an employee of the Memorial Hospital of Greene County. Judge MacMahon in the *Pope* case and Judge Pollack in the case at bar have found that “* * * beyond any genuine issue of fact, defendant hospital is a department of the County of Greene * * *.” Judge Pollack has held as “insufficient as a matter of law” the interlocking factors between the county hospital and the membership corporation as to affect the hospital’s status as a department of Greene County.

The New York State Court of Appeals considered the requirement of prior service of a notice of claim on an employee of a municipal corporation in *Derlicka v. Leo*, 281 N. Y. 266. It was held in that action against physicians for their alleged malpractice in performing an

operation upon a patient in a hospital operated by the City of New York, that a motion to dismiss the complaint as to one of the defendants was properly granted where it was conceded that at the time the action was commenced against him no notice of intention to commence an action had been given to the City of New York or to any of its departments or officers as required by the General Municipal Law.

Since New York's County Law required service of notices of claim on both the hospital and Dr. Fugaro, and since concededly no such notices of claim were ever served, the order dismissing the complaint as to the hospital and Dr. Fugaro and awarding them summary judgment was proper and should be affirmed.

POINT II.

Defendants are not estopped from claiming that the hospital is a department of Greene County. There is no basis for the application of either waiver or estoppel. The question whether the membership corporation known as "Memorial Hospital of Greene County, Inc." continued to exist is "irrelevant."

The answer to the contention advanced in Point II of Grieco's brief can be found in Judge Pollack's memorandum opinion. He observed that "There is no basis for the application of either waiver or estoppel, since a court does not have general discretion to extend the time for filing and the statutory provisions excusing late filing are not applicable in this case" (*Pugh v. Board of Education Central District No. 1*, 38 A. D. 2d 619, 326 N. Y. S. 300, 3rd Dept. 1971, aff'd 30 N. Y. 2d 968, 335 N. Y. S. 2d 830, 287 N. E. 2d 621, decided in 1972) (86a).

Judge Pollack held that the question whether the membership corporation known as the Memorial Hospital of Greene County, Inc., continued to exist was "irrelevant." He stated that "The interlocking factors between the county hospital and the membership corporation are insufficient as a matter of law to affect the former's status as a department of Greene County and thus entitled to the protection of the notice of claim requirements before institution and as a condition of suits for damages." He made reference to *Monahan v. Bergamini*, Sup. Ct., Clinton Co., July 19, 1962, an unreported decision granting summary judgment dismissing a complaint against Memorial Hospital of Greene County for failure to comply with notice of claim requirements. The decision in said *Monahan* case is set forth at pages 54a-55a of the Appendix (88a-89a).

It is significant that Grieco did not bring suit naming the hospital defendant as Memorial Hospital of Greene County, Inc. This shows that he did not place any great reliance on the membership corporation papers filed in that name. As a matter of fact, it is alleged in the second paragraph of Grieco's complaint that the hospital "was and still is a domestic corporation" and not as a membership corporation (5a).

CONCLUSION.

The order appealed from should be affirmed.

Respectfully submitted,

MAYNARD, O'CONNOR & SMITH,
Attorneys for Defendants-Appellees.

JOHN A. MURRAY,
On the Brief.

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